In the Supreme Court of the United States

No. 73-1148

In the matter of the APPLICATION OF CHERYL SPIDER DeCOTEAU, natural mother and next friend, and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT OF HABEAS CORPUS,

Petitioner,

VS.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE STATE OF NORTH DAKOTA, ET AL. AS AMICI CURIAE

ALLEN I. OLSON
Attorney General
State of North Dakota
Capitol Building
Bismarck, N.D. 58505

PAUL M. SAND
First Assistant Attorney General
State of North Dakota
Capitol Building
Bismarck, N.D. 58505

(Other States Joining Set Forth on Inside Cover)

E. L. MERDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

The following States, by their respective Attorneys General, join in the views expressed herein:

Evelle J. Younger
Attorney General
State of California

W. Anthony Park
Attorney General
State of Idaho

Richard C. Turner
Attorney General
State of Iowa

Robert L. Woodahl
Attorney General
State of Montana

Clarence A. H. Meyer
Attorney General
State of Nebraska

Robert List
Attorney General
State of Nevada

David L. Norvell
Attorney General
State of New Mexico

Larry D. Derryberry
Attorney General
State of Oklahoma

Robert W. Warren
Attorney General
State of Wisconsin

Slade Gorton
Attorney General
State of Washington

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INTEREST OF AMICI CURIAE

These states have all experienced the difficult nagging problems of the questionable status of certain geographical areas which were at one time Indian Reservations but later were deemed non-reservation areas and recently designated as Indian Reservations again. This creates a monumental problem with law enforcement and also with the status of lands within the area particularly for the non-Indian landowners.

QUESTION PRESENTED

Whether an Act of March 3, 1891, amending and ratifying an agreement for the outright cession and sale of all of the unallotted lands of the Lake Traverse Reservation to the United States government for a specific sum, disestablished said reservation and restored ceded lands to the public domain.

STATEMENT OF THE CASE

Petitioner, an enrolled member of the Sisseton-Wahpeton Sioux Tribe, is the mother of Robert Lee Feather and Herbert John Spider. On March 12, 1971, pursuant to the standard consent forms then in use by the Department of Public Welfare, State of South Dakota, the youngest child, Robert Lee Feather was given up for adoption by his mother. The older child, Herbert John Spider, was placed in a foster home by the district county court after neglect and dependency proceedings were instituted by the Department of Public Welfare, State of South Dakota, on December 17, 1971.

In August of 1972, Petitioner moved to dismiss the above orders on the ground that all incidents giving rise to the proceedings occurred in Indian Country, to wit: Within the boundaries of the Lake Traverse Reservation. The motion was denied. Petitioner then initiated a Writ of Habeas Corpus in the South Dakota Circuit Court, Fifth Judicial Circuit, on August 16, 1972, seeking to release the children from the care and custody ordered by the district county court. A hearing was held on August 31, 1972, and the Writ was denied. Essentially, the circuit

court concluded, in line with the prior history of judicial interpretation given the Act of March 3, 1891, that the Lake Traverse Reservation as established in 1867 no longer existed. Notice of appeal to the Supreme Court of South Dakota was served by Petitioner, assigning as error the conclusions of law of the circuit court.

On October 31, 1973, the Supreme Court of South Dakota, adhering to the same precedent, affirmed. Petitioner had argued that all land once within the boundaries of the Lake Traverse Reservation was still within the boundaries of the Lake Traverse Reservation and that the district county court did not, therefore, have jurisdiction over any portion thereof with respect to the issue in the instant case. In its opinion the court rejected the arguments of Petitioner and found that the 1867 Lake Traverse Reservation had been effectively disestablished and restored to the public domain by the Act of March 3, 1891. The opinion was addressed only to the issue, as raised by Petitioner, that related to the portion of the 1867 reservation subject to the 1891 Act. Acts or omissions resulting in child neglect that may have occurred on the allotted or trust portion of the original Lake Traverse Reservation not within the purview of the 1891 Act, were not considered by the court below.

ARGUMENT

I

The Cession Language of the Act Is Clear and Convincing

The Lake Traverse Reservation was disestablished by Congress in 1891 by the ratification of an 1889 agreement. Article I of the 1889 agreement which was ratified by Congress in 1891 through Chapter 543, 26 Stat. 989 provides as follows:

> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in Article 4 of this agreement shall have been made.

The terms *cede, sell, relinquish,* and *convey,* up to and including the period of 1860 to 1891, had acquired strong, definite, clear meanings as established by their continued use in treaties between nations and countries. For example, the Circuit Court of Appeals in *Goetze* v. *U. S.*, 103 F. 72, 77 (1900) observed generally:

> When one nation cedes territory to another, it hands over the title and sovereignty, good as against all the world. But this does not necessarily determine in what way it shall be held by the new sovereign. As was said by Chief Justice Marshall in *Insurance Co.* v. *Canter,* 1 Pet. 541, 7 L.Ed. 254:

> The usage of the world is, if a nation be not entirely subdued, to consider the holding of acquired territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.

The same strong and definite meaning is present in the history of the language in Indian treaties and agreements:

> Ordinarily, Indian title is extinguished by cession under treaty or act of Congress, and the land ceases to be Indian country when the cession becomes effective. U.S. Department 7 of the Interior, *Federal Indian Law* 16 (1958).

With specific reference to an 1892 cession agreement, the language of which is substantially identical to the cession language of the instant agreement, the Eighth Circuit Court of Appeals in *United States* v. *Myers*, 206 F. 387 (CA 8, 1913), stated:

> It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal. *United States* v. *Myers, supra* at 392.

These cession terms, specifically when used in conjunction with each other are all inclusive and embrace all of the subject matter connected therewith unless otherwise specifically so stated. The import or impact of these terms have become so strong that it would require a specific

exception to remove some pertinent right or privilege connected with the subject matter ceded and relinquished from being included. Congress was aware of this fact. In other instances special rights in ceded lands were specifically reserved for Indian tribes. *Federal Indian Law* at 158-159 sets forth clearly and concisely several examples of cessions of this nature:

> By way of softening the shock of land cession, the Indian tribes were often guaranteed special rights in ceded lands such as the exclusive right of taking fish in streams bordering on the reservation, or "the right of hunting on the ceded territory, with the other usual privileges of occupancy until required to remove by the President of the United States," or to hunt on the lands ceded to the United States or "perpetual right of fishing" at a falls "without hindrances or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States," or to hunt and make sugar on ceded land. *Federal Indian Law* 158-159 (1958).

In the absence of these specific exceptions, the language of the Act is controlling. As the court in *Myers* noted:

> When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.
>
> Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed

should be devoted to these purposes? We can find none. *Myers, supra* at 391.

The absence of specific exceptions in the cession agreement in the instant case is similarly significant.

The language of the Act in the vernacular of the Midwestern "Old Timer" can be summed up in the following statements: "The tongue goes with the wagon" or "the tail goes with the hide." If these terms do not carry the all inclusive concept meaning, we could have problems with the Louisiana Purchase, the Alaskan Purchase, treaties with foreign countries pertaining to Florida and other similar type transactions. We must assume that Congress, who has been familiar with the terms, actually meant to use these terms in their common usage and intended to disestablish the Lake Traverse Indian Reservation.

Between governments, jurisdiction and other similar rights and prerogatives have been so closely associated and related to the title of land that Congress found it necessary, to avoid confusion, to amend 40 U.S.C. 255, to provide that the United States does not acquire exclusive or partial jurisdiction upon the acquisition of title to land unless notice to the Governor of the State is given to that effect.

II

The Language and Legislative History of the Sisseton-Wahpeton Act Is Distinguishable from Prior Judicial Pronouncements on Other Acts

The case of *Seymour* v. *Superintendent*, 368 U.S. 351, 7 L.Ed.2d 346, 82 S.Ct. 424 and *Mattz* v. *Arnett*, 37 L.Ed.2d 92, 93 S.Ct. ....., 412 U.S. 481 (1973) can be readily distin-

guished from the instant subject matter. The *Seymour* and *Mattz* cases were not concerned with the specific cession language as used in the present matter. The Court in *Seymour* reaffirmed its conclusions reached in *U. S.* v. *Celestine* that "when Congress has once established a reservation or tracts included within it they remain a part of the reservation until separated therefrom by Congress." (54 L.Ed. 195). In the *Mattz* case the Court concluded that "a congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." In support thereof the Court cited *Seymour, supra.*

The accumulative effect of the aforementioned cases clearly illustrates that legislative history and the interpretations and constructions of the Congressional acts by officials who are charged with the implementation and administration of the acts need be, or should be, examined to determine the ultimate intent of an act which may be ambiguous. As to the value of Legislative history and historical documents, see also 18 S.D. L. Rev. 122-128 (1973), which we believe is convincing.

Contemporaneous constructions placed on an ambiguous statute by the officers of or department charged with their enforcement and administration are to be considered and given weight specifically if such construction has been observed and acted on and acquiescent for a long time. (82 C.J.S. Statutes, Section 359, page 761).

The letter dated November 18, 1902, from W. A. Jones, Land Commissioner to Senator A. B. Kittridge making reference to *former* Sisseton Reservation and the letter dated February 10, 1906, by Congressman Burke to Commissioner of Indian Affairs inquiring as to the former Sisseton Indian Reservation in South Dakota, and other

correspondence making reference to the *former* reservation, copies of which are set forth in Respondent's Appendix I, pages 1 through 14, clearly compel the conclusion that the officials who were charged with the administration of the act deemed the Sisseton Reservation disestablished. No significant material has been surfaced which would indicate a different conclusion. The general land office and land commissioner in the Department of Interior were charged with the duties and responsibilities created by the 1891 Act. The legislative history and other related terms are treated extensively in Brief for Respondent and mere repetition would serve no meaningful purpose.

The contemporary interpretation and construction as a matter of legal logic should be favored over a construction or interpretation placed upon the same language fifty or sixty years later under different conditions and surrounding circumstances.

We submit that had the Supreme Court of United States ruled as it did in the *Seymour* case and *Mattz* case prior to the enactment of 1891 a different result most likely could be obtained. It is legally unrealistic and not within the scope of justice to view or interpret the language in the 1891 Act in line with the pronouncements of the U.S. Supreme Court 50 or 60 years later, or to require the earlier acts to meet the refined standards only recently developed. Those acts must be viewed in light of the standards, customs, and usages existing at the time. The setting prevailing or existing should be a strong consideration or factor in determining the legislative intent.

III

The Grant of School Section Land in Accordance with a Specific Provision of the Enabling Act Reinforces Disestablishment of the Reservation

The 1891 Act in itself, by another one of its provisions militates in favor of disestablishment rather than retention of the Indian reservation. Section 30 of the 1891 Act provides that Sections 16 and 36 of each township are to be set aside for common school purposes. This provision when considered in conjunction with the Enabling Act makes it clear that the reservation was intended to be disestablished. The Enabling Act, 25 Stat. 676, in Section 10 thereof and as is pertinent herein provides that: "Sections 16 and 36 in every township * * * are hereby granted to said states for the support of common schools * * *." The Enabling Act continues by stating:

> nor shall any lands embraced in Indian, military or other reservations of any character, be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become part of the public domain.

This is significant in two instances namely: (1) the granting and setting aside of Sections 16 and 36 in each township and (2) the conditions and circumstances when such sections may be set aside. These items clearly evince a legislative intent that the Indian reservation was disestablished or extinguished by the 1891 Act. It must be assumed that Congress in 1891 was aware of what it had enacted only two years earlier in the Enabling Act of 1889. We cannot conjecture that Congress overlooked or disregarded the Enabling Act. The term "public domain"

as used in the Enabling Act obviously has the same meaning as it had or has in the Sisseton-Wahpeton Legislative history. We cannot speculate or conjecture that the Congress intended to give a different meaning to such term in related instances within a short period of time. In the absence of any showing to the contrary, it compels the conclusion that the meaning of the phrase "restored to and become part of the public domain" is the same in each instance. This conclusion is supported when it is recognized that the terms were used in relative similar subject matter and in a comparable context and within a relative short span of time.

The conclusion that Lake Traverse Indian Reservation was disestablished is consistent with the last phrase of Section 30 of the 1891 Act which makes all of the ceded land subject to state laws. The setting aside of lands in Sections 16 and 36 on Indian reservations conditioned upon the reservation being extinguished, as provided for in the Enabling Act lends strong support that the last phrase "be subject to the laws of the state wherein located", applies to all of the land ceded, sold, and relinquished therein and not only to the lands in Sections 16 and 36. This conclusion is consistent and is in harmony with the seven members of the English department of the University of South Dakota as set out on page 31 of Respondent's Appendix I.

IV

Subsequent Congressional Action on Related Matters Is Not Inconsistent but Rather in Harmony with the Disestablishment of the Reservation in Question

The enactment of 18 U.S.C. 1151 (c) is further evidence which supports the conclusion that Lake Traverse Reserva-

tion and other similar reservations under similar acts were disestablished. If the lands "opened and put in public domain" were still part of the Indian reservation, there would have been no need for the enactment of sub section (c).

> Clause (c) came into the statute as the result of the holding in United States v. Pelican, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1942), namely, that lands allotted to Indians remained within the definition of Indian country even though the rest of the reservation was opened to settlement. See Reviser's Note following 18 U.S.C.A. Section 1151 (1966), and 80th Congress House Report No. 304. Clause (c) is an addition to and not a limitation upon the definition of Indian country embraced in the preceding portions of Section 1151. We regard clause (c) as applying to allotted Indian lands in territory now open and not as something which restricts the plain meaning of clause (a)'s phrase "notwithstanding the issuance of any patent". Although this result tends to produce some checkerboarding in non-reservation land, it is temporary and lasts only until the Indian title is extinguished. The congressional purpose and intent seem to be clear. See *State ex rel. Hollow Horn Bear* v. *Jameson, supra,* pp. 184-185 of 95 N.W.2d. *Beardslee* v. *United States,* 387 F.2d 280 (1967).

It is recognized in the enactment of subsection (c) there is a possibility of creating checkerboard jurisdiction which was of some concern to this Court in the *Seymour* case, *supra.* However, the mere avoidance of checkerboard jurisdiction by retaining the reservation can possibly create severe problems in other legal aspects which will be mentioned later. We submit that this is a decision to be made

by Congress which is concerned with the wisdom and desirability of its acts and in the absence of a constitutional issue, the judiciary should not be concerned with the desirability or wisdom of an act.

If under the 1891 Act the reservation had not been extinguished, many serious problems can arise which pertain to the question whether or not section lines are in fact set aside for public roads or if express permission must be obtained from the allottee or the Indian tribe to build or maintain roads on the reservation. In addition to this, will the Indian tribe be in a position to zone areas so as to deprive the non-Indian owner the use of the land. We are here not addressing ourselves to the routine zoning regulations but to regulations which may be designed to severely limit the use of the land. The same thing may be said with reference to the regulation of various business activities within the reservation. Could the Indian tribe require permits of every person before they may engage in any business including that of agricultural activities? Could the Indian tribe prohibit certain lawful activities? The further question would be whether or not hunting on the "patented land" sold to a non-Indian would be permitted by Indians without consent or permission of the landowner. There are many other similar related questions, such as water reservoirs and water rights for lawful usage if the water is located on an area within the Indian reservation.

We consider these items to be legislative in nature and are to be resolved or were in fact resolved by the 1891 Act. They become problems if the act is not recognized as having disestablished the reservation. The fear of "Checkerboard Jurisdiction" should not be the deciding factor.

To the best of our knowledge patents issued to persons who purchased land under the 1891 Act by complying with the Dawes Act did not contain any exception or exclusion or other provisos. The purchaser of the land has a right to assume that these lands would be subject to state jurisdiction and not under the domain and control of the Indian tribe.

We agree substantially with the position of Respondent and are in accordance with the arguments set out in Brief for Respondent. It would serve no useful purpose to repeat at length the arguments set forth therein.

The language employed in the cession of the reservation by the Sisseton-Wahpeton tribe for a valuable consideration to the United States and the ratification of said agreement by Congress in the Act of May 3, 1891, leads to the inescapable conclusion that the reservation by such action was disestablished.

Any remaining legislative intent, if any, must be resolved in favor of the above conclusion after examination and consideration of the legislative history and historical documents which have been set out and briefed by Respondent.

It is improper to create an ambiguity for purposes of resolving same in favor of the Petitioner. If the Petitioner is entitled to further considerations or reparations, which may well be the case, it should not be done by rewriting history. The palpable and obvious meaning of the words in the 1891 Act cannot be disregarded. (See Justice Harlan's Comments in *United States* v. *Choctaw Nation*, 179 U.S. 494 (1900).) See also *United States* v. *Minnesota*, 270 U.S. 181 (1926).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of South Dakota in the instant case, *DeCoteau* v. *District Court,* No. 73-1148, should be affirmed and consequently, the decision of the Eighth Circuit, *Erickson* v. *Feather,* No. 73-1500, should be reversed.

Respectfully submitted,

ALLEN I. OLSON
Attorney General
State of North Dakota
Capitol Building
Bismarck, North Dakota 58505

PAUL M. SAND
First Assistant Attorney General
State of North Dakota
Capitol Building
Bismarck, North Dakota 58505

Attorneys for the State of North Dakota, et al., Amici Curiae